

***United States Court of Appeals
for the Second Circuit***



APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE

SECOND JUDICIAL CIRCUIT

Docket No. 74-1326

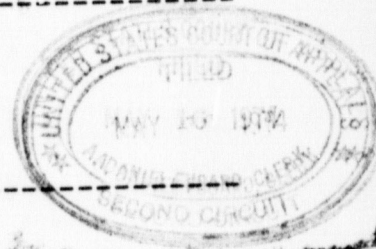
JERE BISHOP, HARVEY BLOW,)
JOHN KASPER, MARVIN GREGORY,)
WILLIAM MAYER and)
RICHARD PROVOST,)
On behalf of themselves)
and all others similarly)
situated,)
Plaintiffs-Appellants)

vs.)

KENT R. STONEMAN,)
Commissioner of)
Corrections of the)
State of Vermont; and)
JULIUS V. MOEYKENS,)
Warden, Vermont State)
Prison,)
Defendants-Appelles)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

APPENDIX OF PLAINTIFFS-APPELLANTS



WILLIAM M. DORSCH, Esq.
Vermont Legal Aid, Inc.
15 South Street
Springfield, Vermont 05156

TABLE OF CONTENTS

	<u>Page</u>
District Court Docket Sheet.....	i,ii,iii
Complaint.....	1,2,3,4,5, 6,7,8,9
Intervening Complaint.....	10,11,12, 13,14,15
Affidavit.....	16,17,18, 19,20,21, 22
Opinion and Order.....	23,24,25, 26,27,28, 29,30,31, 32

UNITED STATES DISTRICT COURT

Civ. 73-152

Jury demand date:

COFFRIN

D. C. Form No. 106 Rev.

TITLE OF CASE

ATTORNEYS

JERE BISHOP, HARVEY BLOW, JOHN
KASPER, MARVIN GREGORY, WILLIAM
MAYER and RICHARD PROVOST, on behalf
of themselves and all others similarly
situated

For plaintiffs:
William M. Dorsch, Esq. and
Kathleen M. Mitchell, Esq.
Vermont Legal Aid, Inc.
15 South Street
Springfield, Vermont

Intervening Pltf. Joseph D. Laura

VS.

KENT R. STONEMAN, Commissioner of
Corrections of the State of Vermont
and JULIUS V. MOEYKENS, Warden,
Vermont State Prison

For defendant:
Charles A. Bristow, Esq.
Assistant Attorney General
Department of Corrections
State Office Building
Montpelier, VT

STATISTICAL RECORD

COSTS

DATE

NAME OR
RECEIPT NO.

REC.

J.S. 5 mailed JUL 5 1973

Clerk

J.S. 6 mailed JAN 4 1974

Marshal

Basis of Action:

Docket fee

Witness fees

Action arose at: 2

Depositions

DATE	PROCEEDINGS	Date Of Judgment
973		
ne 4	Filed Petitioners' Motion for leave to file in Forma Pauperis.	1.
" "	Filed Affidavit of Jere Bishop in support of Motion for leave to proceed in Forma Pauperis.	2.
" "	Filed Affidavit of Harvey Blow in support of Motion for Leave to proceed in Forma Pauperis.	3.
" "	Filed Affidavit of John Kasper in support of Motion for Leave to proceed in Forma Pauperis.	4.
" "	Filed Affidavit of Marvin Gregory in support of Motion for Leave to proceed in Forma Pauperis.	5.
" "	Filed Affidavit of William Mayer in support of Motion for Leave to proceed in Forma Pauperis.	6.
" "	Filed Affidavit of Richard Provost in support of Motion for Leave to Proceed in Forma Pauperis.	7.
" "	Filed Order that Motion of Plaintiffs Bishop, Kasper and Mayer to proceed in Forma Pauperis is granted -- the applications of Blow, Gregory and Provost is denied for lack of standing -- Petitioners permitted to file and Clerk to accept Complaint without prepayment of required fee and Petitioners not required to pay Marshal's fees. Mailed copy to Attorneys.	8.
" "	Filed Complaint.	9.
" "	Issued Summons.	10.
" 13	Filed Summons returned served.	11.
" 26	Filed Defendants' Motion to Dismiss.	12.
" "	Filed Memorandum in Support of Defendants' Motion to Dismiss.	13.
July 6	" Pltfs' Interrogatories and Request for Production of Documents.	14.
" 11	Filed Defendants' Motion for extension of time to respond to Interrogatories and produce documents.	15.
" "	Filed Defendants' Memorandum in support of Motion for Extension of time.	16.
" "	Filed Affidavit.	17.
" "	Filed Certificate of Service.	18.
" "	" Notice and Order re memorandum. Mailed copy to Attys.	19.
Sept. 5	" Pltfs' Memorandum Opposing Defts' Motion to Dismiss and Supporting Class Action.	20.
" 20	In Chambers before Judge Coffrin, hearing on Defendants' motion to dismiss, Kathleen Mitchell, Esq. and William Dorsch, Esq. for Plaintiffs; Charles Bristow, Esq. and Alan Cook, Esq. for Defendant.	21.
" "	Decision reserved.	
" "	With respect to Plaintiffs' request for class action; no action taken at this time.	
" "	Hearing on defendants' motion for extension of time to respond to interrogatories and produce documents, consented to by Plaintiffs, it is	
" "	Ordered: Motion granted.	
Oct. 2	Filed Deposition of Wayne Carlson.	
" 26	" Motion of Joseph DiLaura to Intervene.	
" 30	In Chambers before Judge Coffrin, John Dooley, III, Esq., for Plaintiffs. Alan Cook, Ass't Attorney General, for Defendants.	
" "	Hearing on Motion to intervene by intervening Plaintiff, Joseph DiLaura.	
" "	Mr. Cook makes statements to Court who states he does not think this is the time for the motion to intervene until it is known whether or not Plaintiff Bishop will be dismissed.	
" "	Mr. Dooley makes statements to Court in support of Motion to	

D. C. 110 Rev. Civil Docket Continuation

iii

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JERE BISHOP, HARVEY BLOW,)
JOHN KASPER, MARVIN GREGORY,)
WILLIAM MAYER and)
RICHARD PROVOST,)
On behalf of themselves)
and all others similarly)
situated,)

Plaintiffs)

vs.)

KENT R. STONEMAN,)
Commissioner of Corrections)
of the State of Vermont;)
and)
JULIUS V. MOEYKENS,)
Warden, Vermont State)
Prison,)
Defendants)

CIVIL ACTION NO. _____

COMPLAINT

I. Statement

This civil rights action by state prisoners housed at the Vermont State Prison seeks a preliminary and permanent injunction ordering the defendants to provide the plaintiffs with essential, proper and adequate medical treatment at the State Prison. In addition, this action seeks a preliminary and permanent injunction ordering the defendants to institute a positive program to improve the medical facilities at the State Prison to the end that the facilities are proper and adequate for the care of the inmates.

II. Jurisdiction

1. This Court has jurisdiction over the complaint under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) and (4).

III. Parties

2. Plaintiff, Jere Bishop, was sentenced April 19, 1968 by the Windsor County Court, to the Vermont State Prison for a period of ten to twelve years for the offense of manslaughter. Jere Bishop is presently housed in the Vermont State Prison.

3. Plaintiff, Harvey Blow, was sentenced September 29, 1972 by the Vermont District Court, Chittenden Unit Number 2, for a period of one to five years for the offense of open and gross lewdness. Harvey Blow was transferred to the Vermont State Prison on November 29, 1972.

4. Plaintiff, John Kasper, was committed September 22, 1972 by the Vermont District Court, Rutland Unit Number 1, for safekeeping. John Casper has five charges pending against him and is housed at the Vermont State Prison.

5. Plaintiff, Marvin Gregory, was sentenced September 5, 1972 by the Bennington District Court, Unit Number 1, for a period of eighteen months to three years for the offense of lewd and lascivious conduct. Marvin Gregory was transferred to the Vermont State Prison on October 18, 1972 where he was housed until May 16, 1973 when he was transferred to the Rutland Correctional Center.

6. Plaintiff, William Mayer, was sentenced to the Vermont State Prison April 3, 1970 by the Vermont District Court, Chittenden Unit Number 2, for a period of six to ten years for the offense of armed robbery. William Mayer is presently housed at the Vermont State Prison.

7. Plaintiff, Richard Provost, was sentenced to the

Vermont State Prison April 20, 1970 by the Vermont District Court, Chittenden Unit Number 2, for a period of three years for the offense of breaking and entering. Richard Provost was housed at the Vermont State Prison until March 1, 1973 when he was transferred to the Rutland Correctional Center where he is presently housed.

8. Defendant, Kent R. Stoneman, acting as the Vermont Commissioner of Corrections, is charged by 28 V.S.A. § 4 with administering the laws assigned to the Department of Corrections by 28 V.S.A. § 1.

9. Defendant, Julius V. Moeykens, acting as Warden of the Vermont State Prison, is responsible for the care and custody of the inmates held at the prison.

IV. Claim

10. The Vermont State Prison medical dispensary and facilities are grossly inadequate to meet the medical needs of the inmates at the Vermont State Prison.

11. The Vermont State Prison has too few medical staff attendants to meet the needs of the inmates.

13. The Prison contract physician, William H. Krause, M.D. (hereinafter called Dr. Krause), does not have sufficient time available to meet the needs of the inmates.

13. All of the inmates at the Vermont State Prison are exposed to inadequate medical diagnosis and care.

14. The Defendants are deliberately indifferent to the Plaintiffs' requests for essential medical treatment.

15. Paragraphs 17 through 38 of this complaint enumerate specific incidents of inadequate medical treatment given to the plaintiffs. These incidents are typical of the medical treatment available at the Vermont State Prison.

16. Plaintiff Jere Bishop has suffered from back problems for approximately one year. After requesting to see Dr. Krause for in excess of six months, Bishop saw Krause in or about November, 1972.

17. In or about December, 1972, the Plaintiff Bishop's back was x-rayed. The Plaintiff Bishop has never been told the results of these x-rayes nor has he been treated for his back problems.

18. In January, 1973, the Plaintiff Harvey Blow told a Prison dispensary medic that he had to speak to Dr. Krause about a replacement for his worn special orthopedic shoe. Dr. Krause did not see the Plaintiff Blow until one week after Blow first asked to see him.

19. The Plaintiff Blow explained to Dr. Krause how he had been building his own orthopedic shoe for several years. Approximately one week later, Dr. Krause brought the Plaintiff Blow an improperly built orthopedic shoe.

20. The improperly built shoe caused the Plaintiff Blow great pain. Blow complained about the shoe to John Cooper, the full-time staff attendant at the Prison dispensary. Cooper attempted to alleviate the pain in several different ways, but refused to let the Plaintiff Blow see a doctor.

21. The Plaintiff Blow wrote a letter to the Defendant

Moeykens asking to see an orthopedic surgeon. Subsequent to writing said letter, the Plaintiff Blow was taken to Windsor Hospital where x-rays were taken.

22. The Plaintiff Blow was not informed of the results of the x-rays taken at Windsor Hospital in spite of his asking for the results several times. The Plaintiff Blow still has the improperly fitted orthopedic shoe, which causes him great pain and he believes causes him grievous injury.

23. On or about February 27, 1973, the Plaintiff Blow frequently requested to see Dr. Krause. In spite of his requests, the Plaintiff Blow did not see Dr. Krause until approximately six days after his injury. During the interim, the Plaintiff Blow was subjected to several ineffective attempts by Prison Hospital attendants to alleviate his injury.

25. Dr. Krause recommended that the Plaintiff Blow have an operation on his affected leg. However, no operation or other effective remedy has been performed on the Plaintiff Blow's leg.

26. Plaintiff John Kasper lost thirty pounds during a three week period in December, 1972. In spite of frequent requests to see Dr. Krause, the Plaintiff Kasper was unable to see Krause for three weeks.

27. When the Plaintiff Kasper finally saw Dr. Krause in December, 1972, Krause did not examine Kasper. At that time, Dr. Krause did prescribe vitamins for Kasper in addition to rest.

28. In mid-January, 1973, the Plaintiff Kasper was given a blood test after said test was requested by his attorney. The

test revealed massive liver damage.

29. The Plaintiff Kasper has had several blood tests. In May, 1973, Kasper's ailment was diagnosed as cirosis of the liver. Kasper has received no treatment for this ailment.

30. Plaintiff Marvin Gregory became sick on or about February 10, 1973. For the next two days, while placing himself on the sick list and requesting to see Dr. Krause, the Plaintiff Gregory was too ill to go to the Prison dispensary. During this time Gregory ran a high temperature and vomited blood.

31. On or about February 13, 1973, Dr. Krause admitted the Plaintiff Gregory to the Prison Hospital. During the five days the Plaintiff Gregory was in Prison hospital, he saw Dr. Krause only at the times he was admitted and discharged.

32. Plaintiff William Mayer requested to see Dr. Krause in January, 1973 for treatment of an injured shoulder. Dr. Krause did not see or treat the Plaintiff Mayer for ten days after Mayer's initial request.

33. Plaintiff Richard Provost could not eat and vomited during late December, 1972. In spite of frequent requests to see Dr. Krause, Provost did not see Krause until on or about January 5, 1973. During this time, the Plaintiff Provost was subjected to several attempts by the dispensary attendant John Cooper to cure his illness.

34. On or about January 5, 1973, Dr. Krause prescribed vitamins for the Plaintiff Provost. However, Krause neither examined Provost nor took tests.

35. On or about January 10, 1973, the Plaintiff Provost

was placed in quarantine after he started turning yellow. Dr. Krause did not see Provost until on or about January 11, 1973. This was the first time Dr. Krause had seen the Plaintiff Provost since on or about January 5, 1973 in spite of Provost's frequent requests to see Krause.

36. The Plaintiff Provost stayed in the Prison Hospital until on or about January 26, 1973. During his time in the hospital, Provost saw Dr. Krause only for a few minutes on his second day in quarantine and on the day he was released.

37. The Plaintiff Provost continued to have problems and, after repeated requests, he finally saw Dr. Krause on or about February 2, 1973. At that time, Provost was placed on a special diet and convalescent status which remained in effect until on or about March 7, 1973.

38. By reason of the medical treatment afforded them at the Vermont State Prison, the Plaintiffs are subject to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

V. Class Action

39. Plaintiffs request that this suit be denominated a class action pursuant to Rule 23, F.R. Civ. P., on behalf of all other prisoners presently in the Vermont State Prison or who will in the future be incarcerated there, inasmuch as the following prerequisites of a class action are met:

a. The class of persons in the Vermont State Prison is too numerous for joinder, inasmuch as the members of the

class change from time to time, so that numerous joinders would be required. Moreover, the average population of the Vermont State Prison is excess of one hundred, and joinder of all these persons would render this suit unnecessarily cumbersome.

b. The questions of law regarding proper and adequate medical facilities at the Vermont State Prison are common to all residents at the Prison.

c. The claims of the representative parties are typical of the claims or defenses of the class.

d. The representative parties will fairly and adequately protect the interests of the class.

VI. Prayer for Relief

40. The plaintiffs therefore pray the Court to issue its preliminary and permanent injunction ordering the Defendants to provide the Plaintiffs, and all others similarly situated, with essential, proper and adequate medical treatment.

41. Plaintiffs additionally pray the Court to issue its preliminary and permanent injunction ordering the Defendants to institute a program to improve the medical facilities at the Vermont State Prison to the end that the facilities are proper and adequate for the care of the plaintiffs and all other persons similarly situated.

DATED at Springfield, Vermont, this 23rd day of May, 1973.

/s/ William M. Dorsch
WILLIAM M. DORSCH, Esq.
Vermont Legal Aid, Inc.
15 South Street
Springfield, Vermont

/s/ Kathleen M. Mitchell
KATHLEEN M. MITCHELL, Esq.
Vermont Legal Aid, Inc.
15 South Street
Springfield, Vermont

ATTORNEYS FOR PLAINTIFFS

[verifications omitted]

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JERE BISHOP, HARVEY BLOW,
JOHN KASPER, MARVIN GREGORY,
WILLIAM MAYER and
RICHARD PROVOST,

On behalf of themselves
and all others similarly
situated,

Plaintiffs

JOSEPH DILaura,

Intervenor

vs.

KENT R. STONEMAN,
Commissioner of Corrections
of the State of Vermont
and

JULIUS V. MOEYKENS,
Warden, Vermont State
Prison,

Defendants

CIVIL ACTION NO. 73-152

COMPLAINT

1. Statement

This civil rights action by state prisoners housed at the Vermont State Prison seeks a preliminary and permanent injunction ordering the defendants to provide the plaintiffs with essential, proper and adequate medical treatment at the State Prison. In addition, this action seeks a preliminary and permanent injunction ordering the defendants to institute a positive program to improve the medical facilities at the State Prison to the end that the facilities are proper and adequate for the care of the inmates.

II. Jurisdiction

1. This Court has jurisdiction over the complaint under 42 U.S.C. §1983 and 28 U.S.C. §1343(3) and (4).

III. Parties

2. The plaintiff-intervenor, Joseph DiLaura, is an inmate at the Vermont State Prison.

3. Defendant, Kent R. Stoneman, acting as the Vermont Commissioner of Corrections, is charged by 28 V.S.A. §4 with administering the laws assigned to the Department of Corrections by 28 V.S.A. §1.

4. Defendant, Julius V. Mooykens, acting as Warden of the Vermont State Prison, is responsible for the care and custody of the inmates held at the prison.

IV. Intervention

5. Pursuant to F.R.C.P. 24(b), plaintiff-intervenor DiLaura applies for permission to intervene in the pending action of Jere Bishop, et al, on behalf of themselves and others similarly situated vs. Stoneman et al, Civil Action No. 73-152 (D.Vt.). The plaintiff-intervenor's claim and the plaintiff's claim in said pending action have questions of law and fact in common. The plaintiff-intervenor's and the plaintiff's claims are based on the grounds that the medical care and treatment at the Vermont State Prison are inadequate and constitute cruel and unusual punishment.

V. Claim

6. The Vermont State Prison medical dispensary and facilities are grossly inadequate to meet the medical needs of the inmates at the Vermont State Prison.

7. The Vermont State Prison has too few medical staff attendants to meet the needs of the inmates.

8. The Prison contract physician, William H. Krause, M.D. (hereinafter called Dr. Krause), does not have sufficient time available to meet the needs of the inmates.

9. All of the inmates at the Vermont State Prison are exposed to inadequate medical diagnosis and care.

10. The Defendants are deliberately indifferent to the plaintiff-intervenor's requests for essential medical treatment.

11. The plaintiff-intervenor has suffered from malaria for some period of time.

12. On or about October 18, 1973, the plaintiff-intervenor had a recurrence of malaria.

13. The plaintiff-intervenor's requests for medical aid were ignored and he was not given any medicine adequate to treat the malaria nor was he examined or seen by a doctor.

14. On or about October 20, 1973, the plaintiff-intervenor contacted Kathleen M. Mitchell of Vermont Legal Aid, Inc. who, after several hours, was able to arrange for the plaintiff-intervenor to be seen by a doctor.

15. Attached is an affidavit by Kathleen M. Mitchell stating the procedure necessary to obtain treatment for the plaintiff-intervenor.

16. Without Kathleen M. Mitchell's intervention, the plaintiff-intervenor would not have received medical attention for his malaria which very likely would have been fatal.

17. By reason of the medical treatment afforded him at the Vermont State Prison, the plaintiff-intervenor is subject to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

VI. Class Action

18. The plaintiff-intervenor requests that this suit be denominated a class action pursuant to Rule 23, F.R.Civ.P., on behalf of all other prisoners presently in the Vermont State Prison or who will in the future be incarcerated there, inasmuch as the following prerequisites of a class action are met:

a. The class of persons in the Vermont State Prison is too numerous for joinder, inasmuch as the members of the class change from time to time, so that numerous joinders would be required. Moreover, the average population of the Vermont State Prison is excess of one hundred, and joinder of all these persons would render this suit unnecessarily cumbersome.

b. The questions of law regarding proper and adequate medical facilities at the Vermont State Prison are common to all residents at the Prison.

c. The claims of the representative party is typical of the claims or defenses of the class.

d. The representative party will fairly and adequately protect the interests of the class.

VII. Prayer For Relief

19. The plaintiff-intervenor therefore prays the Court to issue its preliminary and permanent injunction ordering the defendants to provide the plaintiff-intervenor, and all others similarly situated, with essential, proper and adequate medical treatment.

20. The plaintiff-intervenor additionally prays the Court to issue its preliminary and permanent injunction ordering the defendants to institute a program to improve the medical facilities at the Vermont State Prison to the end that the facilities are proper and adequate for the care of the plaintiff-intervenor and all other persons similarly situated.

Dated at Springfield, Vermont this 24th day of October, 1973.

/s/ William M. Dorsch
William M. Dorsch
Vermont Legal Aid, Inc.
15 South Street
Springfield, Vermont, 05156

/s/ Kathleen M. Mitchell
Kathleen M. Mitchell
Vermont Legal Aid, Inc.
15 South Street
Springfield, Vermont, 05156

VERIFICATION

Joseph DiLaura, being duly sworn, states that he has read the foregoing Complaint, that the allegations of fact contained therein are true, except those allegations made on the basis of information and belief, and as to those, he believes them to be true.

Dated at Windsor, Vermont this 24th day of October, 1973.

/s/ Joseph DiLaura
Joseph DiLaura

Subscribed and sworn before
me this 24th day of October, 1973.

/s/ Paul W. Silver
Notary Public

CERTIFICATE OF SERVICE

This is to certify that the Court rules have been complied with in that a copy of the foregoing Motion To Intervene and Complaint have been forwarded to Charles Bristow, Esq., by mailing a copy of same to him by first class mail, postage prepaid to his address of Assistant Attorney General, Department of Corrections, Montpelier, Vermont on this 24th day of October, 1973.

/s/ William M. Dorsch
William M. Dorsch
Vermont Legal Aid, Inc.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

JERE BISHOP, HARVEY BLOW,
JOHN KASPER, MARVIN GREGORY,
WILLIAM MAYER and
RICHARD PROVOST,
On behalf of themselves
and all others similarly
situated,
Plaintiffs

JOSEPH DILAURA,
Intervenor

vs.

KENT R. STONEMAN,
Commissioner of Corrections
of the State of Vermont
and

JULIUS V. MOEYKENS,
Warden, Vermont State
Prison,
Defendants

CIVIL ACTION NO. 73-152

AFFIDAVIT

Kathleen M. Mitchell, being duly sworn, deposes and
says that:

1. I am a staff attorney with Vermont Legal Aid, Inc.
2. Around 11:00 a.m. on Friday, October 19, 1973, I received a phone call from my office in Springfield, Vermont informing me that Ed Parker, an inmate at the Vermont Correctional Facility in Windsor, urgently wanted to speak with me.
3. I called the Prison and spoke with Mr. Parker immediately. He informed me that Joseph DiLaura, also an inmate in C Block and a transfer resident from Attica, had malaria and had been refused medical treatment. He further

informed me that Joseph DiLaura had contracted malaria in Vietnam and had had several recurring attacks in the past few years. He informed me that Joseph DiLaura had been having cold sweats, was feverish, and was blacking out all Thursday afternoon.

4. I then called Charles Bristow, the Assistant Attorney General for the Department of Corrections, informed him of the information that I had received and requested that Mr. DiLaura receive the necessary medical attention immediately. Mr. Bristow informed me he would look into the matter.

5. About one hour later, Mr. Bristow called me back, informed me that he had spoken with Julius Moeykens, the Warden of Vermont State Prison, and the medic on duty. He told me that Joseph DiLaura was one of the instigators in the recent C Block disturbance, that Joseph DiLaura had refused to see the doctor on Thursday, October 18, 1973, that Joseph DiLaura was receiving some medication for shoulder problems, that the Prison officials did not believe he had malaria, but that his request to see a doctor was a mere ploy or stunt, and that Joseph DiLaura was on the list to see the doctor on his next visit.

6. I informed Mr. Bristow that I would speak with Mr. DiLaura, but that the mere allegation of a fatal disease like malaria should induce the Prison officials to be cautious and seek proper medical care.

7. I then attempted to contact Joseph DiLaura by telephone. After several hours I succeeded. Mr. DiLaura

informed me that he had contracted two types of malaria, valvarex and viciperim, in Vietnam in 1968, and that he had been treated with quinine. Since 1968, he has had recurring attacks of malaria each fall which in each instance was treated with quinine. He further informed me that on Thursday, October 25, 1973, from approximately 12:30 p.m. - 4:00 p.m., he had been experiencing all of the malaria symptoms of cold sweat, fever, blacking out, seizures, and incoherence. He denied refusing to see the doctor and felt such an allegation ridiculous when he knew malaria was fatal.

8. Mr. DiLaura also informed me that the medic had informed him that the medication he was receiving for his shoulder would also care for the malaria if he had it.

9. Finally, Mr. DiLaura informed me that he had seen Mr. Moeykens the morning of October 19, 1973. Mr. DiLaura asked Mr. Moeykens to get him to a doctor. Mr. Moeykens replied that Joseph DiLaura could get adequate medical attention when he returned to Attica. Joseph DiLaura then said he told Mr. Moeykens that he would die if he did not see a doctor and obtain quinine. Mr. Moeykens replied: "Then die."

10. After speaking with my client, I spoke to Mr. Moeykens and asked if a doctor had been to the Prison. When the reply was negative, I requested that Joseph DiLaura see a doctor immediately. Mr. Moeykens informed me that he

couldn't do that, that Mr. DiLaura must follow normal operating procedure by seeing the medic, checking into the hospital, having the medic take his vital signs, and only if necessary would the doctor be called. I then reminded Mr. Moeykens that malaria was fatal, and that quinine was the only treatment, and that precautions should be taken. Mr. Moeykens informed me that he did not need the reminder as he had been a medic himself, that he did not believe there was anything wrong with Mr. DiLaura, that I was interrupting him from a conference, and that Mr. DiLaura must follow the normal procedure.

11. I then spoke again with my client, and advised him to check into the Prison hospital. Joseph DiLaura informed me that that was impossible as he had been "locked-in" his cell, but that he would request to see the medic. He also informed me that his vital organs could possibly indicate nothing as he no longer had the symptoms and that they might not recur for several days.

12. I then called Charles Bristow back, and informed him that I wanted Mr. DiLaura to see a doctor immediately. He informed me that the Prison officials had seen Joseph DiLaura and I hadn't, and that the Prison officials did not believe he had malaria and that they could decide when medical attention was necessary. He also informed me that I was jeopardizing all the credibility he and I had established with the Prison by insisting on calling in a doctor.

I then reminded Mr. Bristow it was Friday afternoon, that Monday was a long ways off, that malaria was fatal, and that credibility was irrelevant when a human life was at stake. I also told him I found it hard to believe that it could not be verified that Joseph DiLaura had a history of malaria, and that at least Attica could be called to confirm. Mr. Bristow then suggested that I call Attica. I then reminded him that it was he and his client that were responsible for the care and custody of Joseph DiLaura. He again told me he would look into it and get back to me.

13. In the meantime, Carl Volvo, a paraprofessional in my office called a hospital in Burlington to find out general information about malaria. He was informed that malarial symptoms are attacks of shaking chills followed by sweating fever, that the person may or may not be anemic, and that the attacks set in every three or four days. He was also informed that diagnosis is assured by a blood smear and that it is treated with quinine or derivatives thereof. He was further informed that the patient must have treatment as it could be fatal.

14. Charles Bristow then called me back and informed me that Attica had been called and that Con Hogan of the Department of Corrections would inform me of the results, but that they did not expect an answer for at least an hour.

I requested that the authorities keep me informed of the events to which Mr. Bristow replied that he would not know the results and could only ask the other persons involved to contact me.

15. I then called the Federal Court House in Burlington to see if I could get a Court Order that Joseph DiLaura receive immediate and proper medical attention. I received no answer as it was late Friday afternoon, and all had left for the day.

16. Con Hogan called me at approximately 5:15 p.m., informed me that Joseph DiLaura had a history of malaria and would receive proper medical attention immediately.

17. In summary, I firmly believe that Joseph DiLaura would not have received the medical attention he so desperately needed.

Dated at Springfield, Vermont this 24th day of October, 1973.

/s/ Kathleen M. Mitchell
Kathleen M. Mitchell
Vermont Legal Aid, Inc.
15 South Street
Springfield, Vermont, 05156

Subscribed and sworn before me this 24th day of October, 1973.

/s/ William M. Dorsch
William M. Dorsch
Vermont Legal Aid, Inc.
15 South Street
Springfield, Vermont, 05156

CERTIFICATE OF SERVICE

This is to certify that the Court rules have been complied with in that a copy of the foregoing Affidavit has been forwarded to Charles Bristow, Esq., by mailing a copy of same to him by first class mail, postage prepaid to his address of Assistant Attorney General, Department of Corrections, Montpelier, Vermont on this 24th day of October, 1973.

/s/ William H. Dorsch
William H. Dorsch
Vermont Legal Aid, Inc.
15 South Street
Springfield, Vermont 05156

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Jere Bishop, John Kasper and
William Mayer, on behalf of
themselves and all others
similarly situated

v.

R. Kent Stoneman,
Commissioner of Corrections
of the State of Vermont and
Julius V. Moeykens, Warden,
Vermont State Prison

Civil Action

File No. 73-152

OPINION AND ORDER

The plaintiffs, state prisoners housed at the Vermont State Prison, allege in this civil rights action that the medical treatment, or lack thereof, available to them at the prison amounts to cruel and unusual punishment in contravention of the eighth amendment to the United States Constitution. The plaintiffs seek to maintain the suit as a class action and ask the Court to order the defendants as Commissioner of Corrections of the State of Vermont and Warden of the Vermont State Prison to provide the class with "essential, proper and adequate medical treatment" and to "institute a program to improve the medical facilities at the Vermont State Prison."

Three of the named plaintiffs, Blow, Gregory and Provost are no longer inmates at the prison and their petition to file the complaint in forma pauperis has been denied by Chief Judge Holden for lack of standing. They are not before

the Court for that reason. The remaining plaintiffs, Bishop, Kasper and Mayer, are present inmates of the prison and are proper representatives of the requisite class should it be determined that the matter should proceed as a class action. Jurisdiction of this Court is properly invoked under 42 U.S.C. §1983 and 28 U.S.C. §§1343(3) and (4).

Electing the option permitted by Rule 12(b) the defendants have not answered the plaintiff's complaint but rather have moved to dismiss it for failure to state a claim upon which relief can be granted. In considering defendants' motion to dismiss we accept as true all of the allegations of the plaintiffs' complaint. Cooper v. Pate, 378 U.S. 546 (1964); Conley v. Gibson, 355 U.S. 41 (1957). In this connection we include those allegations pertaining to the medical treatment of Blow, Gregory and Provost, as being indicative of the type of medical treatment to which the plaintiffs and other members of the class are subjected as prisoners.^{1/}

Assuming the truth of plaintiffs' allegations, we find the question as to whether they have stated a cause of action sufficient to justify the relief which they seek, is capable of no easy resolution. To assist us in this regard, it is necessary first to analyze exactly what the complaint reveals. Plaintiffs make no claim that medical treatment is denied them but rather that they are subjected to cruel and unusual punishment on the grounds, generally stated, that

(1) the prison medical facilities are inadequate, (2) the medical staff attendants are too few, and (3) the contract physician does not have sufficient time to meet the needs of the prison inmates. Additionally the plaintiffs allege that (4) the inmates are exposed to inadequate medical diagnosis and care and (5) the defendants are deliberately indifferent to plaintiffs' requests for essential medical treatment.

In support of the foregoing conclusions, the complaint enumerates certain specific instances of inadequate medical treatment received by the plaintiffs (and those prisoners who originally sought to be plaintiffs) which "incidents are typical of the medical treatment at the Vermont State Prison." In sum these incidents allege delays in providing treatment, delays in being permitted to see a doctor, ineffective treatment by the medical staff and prison physician, and the failure of the prison physician to advise as to the results of x-rays and tests so that the patient involved was unaware as to whether additional treatment was necessary or warranted.

The next step is to focus upon each "typical incident" detailed in the complaint to determine whether, standing alone, it would support a claim under 42 U.S.C. §1983 that the prisoner involved had been subjected to cruel and unusual punishment. Obviously a positive determination that some or all of the prisoners named in the complaint had such an individual cause of action under section 1983 would do much to resolve the propriety of maintaining the instant class action.

Insufficient or improper medical treatment may state a claim under 42 U.S.C. § 1983 but only in "aggravated cases." Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); United States ex rel Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970). In order to sustain such a claim however the complaint must suggest some "conduct that shocks the conscience" or some "barbarous act" and "mere negligence in giving or failing to supply medical treatment alone will not suffice." Church v. Hegstrom, 416 F.2d 449, 451 (2d Cir. 1969); United States ex rel Hyde v. McGinnis, supra, at 866.

The above test was enunciated and applied expressly or impliedly by the Court of Appeals in the following section 1983 actions which alleged in each instance that the medical treatment which the prisoner received or failed to receive at the hands of the prison authorities violated either due process or amounted to cruel and unusual punishment. Wright v. McMann, supra; Church v. Hegstrom, supra; United States ex rel Hyde v. McGinnis, supra; Startz v. Cullen, 468 F.2d 560 (2d Cir. 1972); Corby v. Conboy, 457 F.2d 251 (2d Cir. 1972); Martinez v. Hancock, 413 F.2d 921 (2d Cir. 1970).

Rather than seeking individual redress for the medical treatment afforded or not afforded them, as was the situation in the above cases, the plaintiffs in the instant case seek to establish by a class action that the medical facilities and medical treatment at the Vermont State Prison, taken in their entirety, are so inadequate and insufficient as to give rise

to a constitutional violation cognizant by a section 1983 action. Nevertheless, it is the six specific instances involving the named prisoners (three of whom are plaintiffs) recited in the complaint upon which the instant case must stand or fall. Applying the Second Circuit test to each such "typical incident" we reach the conclusion, necessarily subjective, that the alleged actions of the defendants at the most rise no higher than the level of negligence in providing or failing to provide adequate medical treatment to the named prisoners and the defendants' conduct cannot be considered so barbarous or conscience-shocking in nature as would sustain an independent action under section 1983 for each alleged incident. The result as to each specific incident we consider to be persuasive but not necessarily conclusive on the question as to whether the plaintiffs should be allowed to maintain this class action. It remains to be seen whether the claim taken as a whole may not in fact be greater than the sum of its parts and thus justify the suit. Accordingly, we now examine the complaint in toto.

It is clear from the complaint that the Vermont State Prison provides medical care and facilities which at least include a dispensary, a hospital, diagnostic facilities, (including blood testing and perhaps x-rays) medicines, special diets, orthopedic shoes, medical treatment, medical staff attendants (including at least one occasion and for a specific purpose a prisoner patient was taken to a local hospital.

It seems clear that a substantial amount of medical facilities and treatment is available to the inmates of the Prison and, therefore, it is obvious that the adequacy or inadequacy of the medical care afforded is solely one of degree. Viewing the allegations as true and as favorable to the plaintiffs as possible, we cannot conceive that the medical care which the prisoners receive at the prison is so totally deficient in quantity and quality as to amount to a violation of the prohibition against cruel and unusual punishment provided by the Constitution.

The charge of the plaintiffs which come closest, in our opinion, to amounting to such cruel and unusual punishment is the conclusory allegation that the defendants are deliberately indifferent to plaintiffs' requests for essential medical treatment. Such a claim of deliberate indifference by prison authorities is sufficient to support a section 1983 violation. Martinez v. Mancusi, supra; Corby v. Conboy, supra. However, the alleged facts must support the claim and the mere conclusion that the claim falls in this category is not sufficient to sustain the charge. United States ex rel Gittelmarker v. County of Philadelphia, 413 F.2d 84, 87 (3d Cir. 1969); Hoffman v. Holden, 268 F.2d 280, 295 (9th Cir. 1959); United States ex rel Hyde v. McGinnis, supra, at 366. We are unable to find from the specific incidents enumerated in the complaint that there has been a deliberate indifference to the prisoners

medical needs. At the most such instances suggest that medical aid and treatment was not rendered to the prisoner as expeditiously as he wished or thought proper but this merely suggests delay by, and not deliberate indifference on the part of, the defendants. Furthermore, there is no allegation in the complaint that the medical treatment when received was improper in the circumstances or that the results would have been altered if a different course of treatment had been followed. *

With the possible exception of the incident involving prisoner Harvey Blow and the improperly fitting orthopedic shoe "which causes him great pain and he believes causes him great grievous injury" no ill effects or untoward consequences are alleged to have occurred to the prisoners as the result of any medical treatment received or not received. Since prisoner Blow is not a plaintiff, specific relief with reference to the orthopedic shoe is not available to him in this action and we conclude that that allegation alone is not of such magnitude as to justify the prosecution of this suit as a section 1983 class action.

We reach the conclusion that the allegations taken in their entirety set forth at best mere negligence in providing medical treatment or claims based on differences of opinion over matters of medical judgement and these are insufficient to sustain this section 1983 claim. Corby v. Conboy, supra; United States ex rel Hyde v. McGinnis, supra; Church v. Hegstrom, supra.

In reaching the conclusion which we do we are under no illusion that the medical facilities and treatment at the Vermont State Prison are ideal. They may in fact be more than barely satisfactory. We do not know. We do know, however, at the time of oral argument on the motion, that counsel representing the defendants indicated in some respects that medical care at the Prison was less than could be desired and steps were being taken to improve it. We, of course, commend such a course of action.

Also, in reaching our conclusion we are not saying that in every instance a class action alleging inadequate or improper medical treatment must fail. We believe, however, that for a section 1983 action to be successfully maintained, it should be brought, except in the most extreme circumstances, as an individual action on behalf of an inmate who seeks redress. The nature of any claim involving medical care and treatment, short of total and permanent deprivation to all inmates, is peculiar unto itself and should be judged in most instances in light of its own circumstances and the situation as it existed at the time the claim arose. For that reason we conceive, not only would the inmates' needs be better served by an individual claim on his behalf but that such a claim is likely to provide a salutary effect not only upon the prison administration but upon the entire prison population as well.

It hardly appears necessary to point out that our decision in this matter denies plaintiffs only the right to maintain this section 1983 class action and leaves undisturbed any other cause or causes of action arising from the incidents described in the complaint which they may desire to urge in a proper forum as being meritorious.

Since we are dismissing the pending action we hereby deny the motion of Joseph DiLaura to intervene as a plaintiff but with leave, if he so desires, to bring a section 1983 action to this court on his own behalf.

WHEREFORE, for the reasons stated, the complaint is hereby dismissed.

Dated at Burlington in the District of Vermont, this 20th day of December, 1973.

/s/ Albert W. Coffrin
District Judge

FOOTNOTE

1/ Although noting its contents, we have excluded from consideration the affidavit of Larry Ellison attached to plaintiffs' memorandum of law as being no part of the plaintiffs' complaint. Such an affidavit could be considered in connection with a Fed. R. Civ. P. Rule 56 motion for summary judgment but is not available to the plaintiffs in this Fed. R. Civ. P. Rule 56 motion for summary judgment but is not available to the plaintiffs in this Fed. R. Civ. P. Rule 12(b) motion to dismiss for failure to state a claim upon which relief can be granted.